CALLEJA v. BALZAN: REFLECTIONS ON PUBLIC ORDER

VINCENT A. DE GAETANO

INTRODUCTION

Some years ago Lord Denning wrote on the role of the police:

> In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well-led, well-trained and well-disciplined force of police whom it can trust: and enough of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the accused to justice. The police, of course, must act properly. They must obey the rules of right conduct. They must not extort confessions by threats or promises. They must not search a man's house without authority. They must not use more force than the occasion warrants. But, so long as they act honourably and properly, all honest citizens should support them to the uttermost.[1]

Very often the line of demarcation between proper and improper police conduct is a very thin one indeed, requiring legal skill for its appreciation and judicial interpretation and application for the observance of proper conduct. Until recently, for instance, it was considered to be proper police conduct to release a detainee, for the purpose of safeguarding the rule against detention in excess of forty-eight hours, by simply allowing him to step outside his place of detention and re-arresting him after walking a few feet. The Court of Magistrates of Judicial Police has now set a higher and more exacting standard of police conduct by requiring "manifest and effective" release[2].

Dr. Vincent A. De Gaetano LL.D., Dip.Crim.(Cantab.) is Senior Counsel for the Republic, Attorney General's Office, Malta.

This paper seeks to highlight one other vast area characterised by considerable uncertainty as to what are the limits of proper police conduct and of police powers, namely that of the maintenance of public order. No attempt will be made to exhaust the subject: that would be presumptuous. The aim is simply to put forward some arguments. The paper is largely based on a lecture delivered at the invitation of the Commissioner of Police to Gazetted Officers of the Malta Police Force on the 8th January 1981. The case **Calleja v. Balzan**[3] has been included in the title of this paper, and will be discussed at some length, for two reasons. In the first place, although issues of public order are not necessarily tied to situations of public meetings, processions, and public demonstrations and manifestations, it is obvious that these situations often present a greater risk of concentrated public disorder. Secondly, the judgements in **Calleja v. Balzan**, that is the judgement of the court of first instance and that of the Constitutional Court, touch upon a number of legal principles which are of considerable importance in the context of any discussion on public order.

MOSTA: 10TH AUGUST 1975

Early in 1975 the Government introduced in Parliament a Bill which, in effect, for the first time since the decree **Tametsi** of the Council of Trent was published in Malta by Bishop Domenico Cubelles -- the exact date of publication is not certain[4] -- proposed a civil law for regulating marriage. The law of marriage has been a vexed question in Malta since the advent of British colonial rule[5]. Although as early as 1831 the Colonial Government had expressed its intention to introduce a Marriage Act, nothing of the sort was ever done, the Governor, Sir Frederick Ponsonby, limiting himself to a proclamation punishing clandestine marriages[6]. From 1844, when the problem of mixed marriages in Malta was mooted by the Anglican Bishop of Gibraltar, right down to 1898 when Sigismondo Savona attempted to raise the issue of mixed marriages and the **Tametsi** decree in the Council of Government, the question of the law of marriage in Malta was a hotly debated political issue on which political parties and the clergy took sides[7]. The issue reared its head again in the late nineteen fifties and early sixties[8]. So it was expected that the Marriage Bill of 1975 would cause a storm of protests.

In August of 1975 the people of Mosta decided to crown the titular painting of the Blessed Virgin, after obtaining the necessary approval from the Eccle-

siastical authorities. The ceremony was to be held in the open in the main square of Mosta and was to be preceded by a procession along the main street of the village. Church and civil dignitaries were to share a common platform during the ceremony and were also to participate in the procession. The Rev. Monsignor Philip Calleja and a number of people of like mind thought that the procession and the ensuing ceremony would provide a unique opportunity to express publicly their disapproval of the law which had received the President's assent on the 5th August. Posters, in different colours, expressing disapproval and condemnation of the said law were printed; these were distributed prior to the procession with instructions to hold them in such a way as to be clearly visible to the participants in the procession.

Now, among the people responsible for maintaining law and order in Mosta on that day was Mr. Denis Balzan, then an Inspector of Police. He had been promoted from the ranks only a few months before. At one point while the procession was already moving along Eucharistic Congress Road on its way to the main square, Inspector Balzan was informed by a number of people, including the Archpriest of Mosta, that trouble might erupt as a result of Mgr. Calleja's poster protest; some people even approached Inspector Balzan threatening that unless he intervened to remove the posters they would take the law into their hands. Inspector Balzan warned them not to do anything of the sort but to leave the matter to be dealt with by the police. Inspector Balzan, accompanied by a police sergeant, approached Mgr. Calleja (who by now had entered the main square at the end of the procession itself) and politely asked him to remove the posters (presumably the posters the Monsignor was holding and the posters held by those in the immediate vicinity) adding that that was not the appropriate occasion for a poster protest. The Monsignor refused. At that moment, a woman approached the Monsignor from behind, grabbed the poster he was holding, and threw it on the ground. Undaunted, Monsignor Calleja obtained another poster. The Inspector this time ordered him to remove the poster. Mgr. Calleja again refused, whereupon the Inspector removed the poster from the hands of the Monsignor (the Monsignor, in his evidence, maintained that the Inspector "grabbed" the poster). Mgr. Calleja managed to get yet another poster. This time Inspector Balzan, no doubt exasperated at the behaviour of the reverend gentleman, threatened to arrest Mgr. Calleja. The Monsignor invited the Inspector to note down his particulars and arrest him. Meanwhile, however, the religious ceremony had commenced in the main square, so Mgr. Calleja folded the poster and placed it in his breviary, and the Inspector

left. There was no further incident between the two. During the chanting of the Creed as well as at the very end of the ceremony many of those who had posters, including Mgr. Calleja, held them up high above their heads, but there were no incidents. The encounter between the Monsignor and the Inspector lasted from ten to fifteen minutes. It must be emphasized that throughout that encounter Inspector Balzan acted with due politeness and civility, a fact which was acknowledged both by the First Hall and by the Constitutional Court[9]: paragraph 8(c) of the First Schedule to the Malta Police Ordinance, 1961[10] must have been foremost in Inspector Balzan's mind that day.

Mgr. Calleja had apparently not had enough. He filed an application in the First Hall of the Civil Court alleging that the Inspector's behaviour amounted to a violation and infringement of his fundamental rights and freedoms guaranteed by the Constitution, more precisely of the rights and freedoms guaranteed by sections 41, 42 and 43 of the Constitution; later he restricted his claim to violation of section 42[11], that is, violation of his freedom of expression. The relevant parts of this section are subsections 1 and 2.

> S.42(1): Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

If one were to stop at subsection 1, it is clear that Inspector Balzan **was** interfering with the Monsignor's freedom to communicate ideas and information (about the new law on marriage) to the participants in the procession and to those gathered in the main square of Mosta, if not to the public generally. The Monsignor was not **prevented** from expressing his ideas, but he was **hindered**[12]. It will be observed that in our Constitution freedom of expression embraces and connotes the broad **freedom to communicate** and is not restricted to mere freedom of speech. It is a freedom to which every person in Malta -- not only a Maltese citizen in Malta -- is entitled[13], subject, however, to such possible limitations and restrictions as are authorised by s.46(7) of the Constitution; but whereas a person is entitled to this freedom while **in** Malta, the reception and communication of "ideas and information" is not limited to the territory of Malta[14] (article 10(1) of the European Convention on Human Rights is more explicit on this point: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and **regardless of frontiers.** This Article shall not prevent States from requiring

the licensing of broadcasting, television and cinema enterprises", emphasis added[15]). Interference with freedom of expression may be in the form of previous restraint or of post-expression consequences. In the words of one American author:

> It is vital to recognise at the outset that the freedom of expression extends not only to speech and press but also to areas of **conduct** laced or tinged with expression, such as those of press, assembly, petition, association, lawful picketing and other demonstrative protests.[16]

In a sense even the right to silence is a facet of the right to freedom of expression[17]. It should also be noted that s.42(1) of the present Constitution seems to embrace a slightly wider concept of freedom of expression than the corresponding s.14(1) of the 1961 Constitution. S.14(1) of the Malta (Constitution) Order in Council, 1961 provided that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, **that is to say**, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence", emphasis added. However, in **Borg Olivier et. v. Buttigieg** the words "that is to say" were in effect held by the Privy Council to mean "including"[18].

But subsection 2 of section 42 provides:

> S.42(2): Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision --
>
> (a) that is reasonably required --
>
> (i) in the interests of defence, public safety, public order, public morality or decency or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, protecting the privileges of Parliament, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) that imposes restrictions upon public officers and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

All these limitations to the substantive right, taken together, amount to the "respect for the rights and freedoms of others" and respect for "the public interest" mentioned in s.33 of the Constitution[19].

So there are, as it were, three stages. First, it must be established, as a fact

and independently of other juridical considerations, that there was an interference with freedom of expression or that there is or is likely to be[20] such interference, for example, if a particular law were to be given effect. Secondly, by way of a substantive plea, it may be claimed that the interference was or is being effected or is planned in consequence or under the authority of a law, which law, or particular provision thereof, was "reasonably required in the interests of.....public order", and therefore the interference itself was reasonably required in the interests of [21] public order. Thirdly, even though a law makes provision that is reasonably required in the interests of public order, that provision of law, or the thing done under the authority of that provision of law, may nevertheless be shown not to be reasonably justifiable in a democratic society and therefore unconstitutional. If the provision of law is not reasonably justifiable in a democratic society then, **a fortiori**, the thing done under the authority thereof would likewise not be reasonably justifiable.

PROCLAMATION III OF 1964

Now, admittedly, it is difficult to imagine a law which makes provision that is reasonably required in the interests of public order but which **at the same time** is not reasonably justifiable in a democratic society. After all it is the court which is going to decide what is and what is not **reasonable;** the court is hardly likely to hold that a particular provision of law is reasonable in the context of public order but not reasonable against the yardstick of the requirements of a democratic society, as if the reasonable requirements of public order can be assessed in a vacuum and apart from the society in which the maintenance of public order is sought[21]. Difficult to imagine it may be; totally inconceivable certainly it is not. Indeed, the legislator himself, in another section of the Constitution, has expressly specified one instance where, although a particular provision of law may be reasonably required in the interests of, among other things, public order, that provision **must** be regarded as not being reasonably justifiable in a democratic society and therefore unconstitutional. S.43 deals with freedom of assembly and association. Subsection 3 of that section provides:

> S.43(3): For the purpose of this section, any provision in any law prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages shall be held to be a provision which is not reasonably justifiable in a democratic society.[23]

By definition (s.126(1) of the Constitution) the word "law" includes "any instrument having the force of law" and therefore includes regulations, notices or proclamations made in virtue of an enabling law. Thus, if for the sake of argument, the people of Luqa were in a state of agitation because of band club rivalries and the state of agitation were such that it would be reasonable in the interests of public order to prohibit all public meetings (whether open air or otherwise) and demonstrations in Luqa until the agitation subsided, any proclamation to this effect made by the President in terms of ss.19(2) and 21 of the Public Meetings Ordinance would be unconstitutional[24] -- unless s.43(3) of the Constitution is to be interpreted as referring solely to a "law" prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages **for an indefinite period of time**, an interpretation not warranted either by the wording of the subsection in question or of s.43 in general. If in order to deal with the threat to public order at Luqa the President were to prohibit all public meetings and demonstrations all over Malta and Gozo, that proclamation would then be unconstitutional for a different reason, namely that the prohibition in other localities would not be reasonably required in the interests of public order in those other localities.

One such blanket prohibition was decreed by Proclamation III of 1964. On the insistence of the Police, the Governor prohibited "from the 16th day to the 24th day of September 1964, both days inclusive, the holding of all public meetings in the Island of Malta and its Dependencies and of all demonstrations in any place open to the public in the Island of Malta and its Dependencies, other than such as form part of the official Independence Celebrations". The Proclamation was challenged in court as being **ultra vires** the enabling law and as being unconstitutional[25]. The Constitutional Court held that the Proclamation was "intra vires" and that it did not infringe any fundamental right or freedom guaranteed by the 1961 Constitution. In the context of public order, demonstrations, which by definition are always held in the open[26], seem to pose greater problems than public meetings. Under s.19(1) of the Public Meetings Ordinance, the Police Commissioner may, with the approval of the Minister responsible for the Police, and for reasons of public order, prohibit the holding of any public meeting in respect of which notice has been given to him in terms of the Ordinance. Such a prohibition against the holding of a specific public meeting would not fall foul of subsection 3 of section 43 of the Constitution. But no previous notice or permission is required for

the holding of a demonstration[27]. Short of a proclamation, therefore, the Commissioner of Police would have to order the dispersion of every demonstration in progress or about to commence in the streets or open spaces of Luqa in order to maintain public order among the agitated villagers[28].

A law that is reasonably required in the interests of public order in Malta is **prima facie** reasonably justifiable in a democratic society. This equation, however, should not be applied **a priori** when what is being impugned or challenged as unconstitutional is not a provision of law, but a **thing** or **act** done **under the authority** of a provision of law. Moreover the equation cannot have any logical application whatsoever when the thing or act is not even a thing or act done under the authority of a law, as for example was the Department of Health circular 42/62 in **Borg Olivier et. v. Buttigieg**[29]. A law may make provision that is reasonably required in the interests of public order, but because that law allows a certain margin of administrative discretion in its application, the way that discretion is used (that is the act or thing done under the authority of that law) may not be reasonably justifiable in a democratic society, that is, it would amount to an abuse of administrative discretion by the standards of a democratic society and therefore by the standards of the Constitution. In **Il-Pulizija v. Ganni Camilleri et.**[30] the First Hall of Her Majesty's Civil Court held that

> ....anke kieku l-Proklama ma kinetx ligi, imma semplici att tar-ram ezekuttiv, jibqa dejjem li hija att li, salva l-kwistjoni tal-validita' taghha, tidher maghmula "taht jew skond l-awtorita' tal-ligi", u l-Qorti hija obbligata tirresisti s-suggeriment li biex ic-cittadini jkunu jistghu jimpunjaw att "purporting" li sar taht ligi jridu bilfors jimpunjaw il-ligi. Dana mhux biss kuntrarju ghall-kliem cari tad-disposizzjonijiet sotto ezami[31] imma jista' jkun fomiti ta' tentativi superfluwi ta' mpunjazzjoni ta' ligijiet perfettament tajbin kull darba li xi ufficjal tal-Gvern jirfes riglejn xi hadd u jigi mharrek taht id-disposizzjonijiet dwar il-"human rights".[32]

Her Majesty's Constitutional Court did not disagree with or challenge this statement[33]. More recently, however, that same court -- now styled Constitutional Court -- has held that

> ....biex att amministrattiv, maghmul in konformita' ma' provvediment ta' ligi, u kwindi awtorizzat b'dik il-ligi, jigi dikjarat null u bla effett, ikkunsidrat fih innifsu, ghax jikser l-artikolu 42 tal-Kostituzzjoni, irid jigi wkoll necessarjament dikjarat li l-provvediment li jawtorizza dak l-att jikser l-istess artikolu 42, ghax l-illegalita' ta' l-azzjoni amministrattiva hija l-effett ta' l-inkostituzzjonalita' tal-provvediment legislattiv, li hija kawza; f'kaz bhal dan, ghalhekk, kull azzjoni diretta ghall-impunjazzjoni ta' l-att amministrattiv ma tistax f'dan il-kontest tigi kkunsidrata isolatament u indipendentement mill-provvediment legislattiv li tahtu jkun sar dak l-istess att, ghax l-illegalita' tal-att hija necessarjament il-konsegwenza ta' l-illegalita' tal-ligi, b'mod li biex tigi stabbilita wahda trid tkun qabel giet stabbilita l-ohra. 34

The court went to considerable pains to emphasize that not every administrative act purporting to be done under the authority of a law was exempt from challenge on the grounds of unconstitutionality:

> Biex azzjoni amministrattiva, pero', allegatament maghmula in forza ta' ligi partikolari tista' tigi dikjarata nulla u bla ebda effett bla ma tkun giet fl-istess hin impunjata l-istess ligi (dejjem indipendentement minn impunjazzjoni fuq bazi ta' diskriminazzjoni) ovvjament jinhtieg li dik l-azzjoni fiha nnifisha tkun vizzjata, b'mod li allura ssir illegali u ma jkunx jista' jinghad aktar li dik l-azzjoni giet maghmula validament in konformita' mal-ligi. 35

It has been said that this judgement in practice rules out the possibility of judicial redress in most cases of violation of human rights[36]. This criticism, however, does not seem totally justified. The Constitutional Court was limited in its judgement by the very facts of the case, and even more limited by applicants' own submissions and by the judgement of the first court. Applicants maintained that the **written** order made by the Minister of Public Works in terms of s.13 of the Aesthetic Buildings Ordinance (Cap.135) ordering them to remove an electronic broadcaster from atop the Nationalist Party Club in Valletta violated their fundamental rights and freedoms guaranteed by ss.42 and 46 of the Constitution. S.13 itself of the Ordinance was never put in issue. Moreover applicants agreed that the order was made under the authority of the said s.13 and in conformity thereto. The first court held that the Minister's order (not the enabling s.13) was not reasonably required in the interests of public order because the purpose of the enabling Ordinance was not the preservation or maintenance of public order. And the first court stopped there. S.46 was not considered. The question of whether the order was reasonably justifiable in a democratic society was not considered; nor was the question considered of whether the (written) order was itself a "law". Hence the Constitutional Court:

> Il-ligi in kwistjoni m'hijiex wahda minn dawk protetti fl-Ewwel Skeda tal-Kostituzzjoni, imma b'dana kollu qatt ma giet in diskussjoni, u huwa appena necessarju jinghad li l-Qorti tiddecidi biss dwar il-kwistjoni li jkollha quddiemha, fuq il-kawzali dedotti fit-talba li ssir quddiemha, u ghalhekk ma tistax tiddikjara null u bla effett dak li l-legalita' u l-validita' tieghu mhuwiex in diskussjoni, jew inkella tiddikjara null xi att partikolari fuq kawzali ta' nullita' ta' xi haga ohra meta din il-kawzali ma tkunx giet dedotta. 37

However in at least one case since **Galea noe. et. v. Il-Kummissarju tal-Pulizija et.** and **Galea noe. et. v. Salvu Sant noe.** were decided, the First Hall of the Civil Court **appears** to have refused to follow those judgements. In **Il-Pulizija v. Dr. Louis Galea et.**[38] the court held:

> Fit-trattazzjoni orali, il-konsulent legali tal-Pulizija, issottometta illi r-rifjut imsemmi sar "skond l-awtorita' ta' ligi" li ma gietx attakkata mill-imputati bil-konsegwenza

> li l-imputati ma jistghux jattakkaw ir-rifjut ga la darba ma kienux, qabel, jattakkaw il-ligi. Din is-sottomissjoni mhix legalment korretta; fil-fehma tal-Qorti, kull att, **salv s'intendi l-kwistjoni tal-validita' o meno tieghu,** jista' jigi attakkat mill-individwu li jinvoka favur tieghu id-disposizzjoni tal-Artikolu 42 tal-Kostituzzjoni minghajr il-bzonn li l-individwu jimpunja wkoll il-ligi li tahtha u skondtha dak l-att **jigi allegat** li sar....altrimenti jigri li att ta' xi ufficjal, abusiv kemm hu abusiv, ma jkun jista' qatt jigi impunjat in forza tad-disposizzjoni li tiggarantixxi dan id-dritt fundamentali f'kaz li **jigi allegat** li dak l-att ikun sar taht l-awtorita' ta' xi ligi, li wiehed ghandu jahseb tkun, bhala regola, perfettament tajba[39] (emphasis added).

It is submitted that on this point this judgement is in reality perfectly reconcileable with the two "electronic broadcaster" judgements and with previous case-law. The Police have appealed from the judgement and the case is now pending before the Constitutional Court.

We must now turn back to **Calleja v. Balzan.**

PRESERVING PUBLIC ORDER AND PEACE

Before the First Hall of the Civil Court respondent Balzan pleaded that he had only acted in execution of his duty to preserve public order[40]. No serious attempt appears to have been made by respondent to plead subsection 7 of section 48 of the Constitution, namely that the provisions of the Criminal Code were protected from unconstitutionality by the same Constitution, that he had acted in terms of, and in conformity with, the Criminal Code, and that therefore his behaviour could not possibly be in violation of the Constitution (although there is a passing reference to this subsection in the first court's judgement[41]). This line of argument had been upheld by Her Majesty's Constitutional Court in **Il-Pulizija v. Francesco Certo et.**[42] decided in 1968 -- and in numerous cases since -- although in the Certo case the legal issue involved was one of criminal procedure rather than substantive criminal law. Why did Balzan not invoke the notorious s.48(7) as a main plea? One possible reason is that respondent's counsel as well as the first court may have entertained the view that the term "public order" as used in the Constitution has exactly the same meaning as the phrase "public order and peace" in s.358(1) and "public good order or the public peace" in s.352(bb) of the Criminal Code (and possibly also the same meaning as "the public peace" in ss.395(1) and 396 -- the "binding over" sections of our Criminal Code). If that were so, it would obviously have been superfluous to invoke s.48(7); if the Inspector's behaviour was necessary to preserve public order and peace in line with his duty under the Criminal

Code, then it was also reasonably required in the interests of public order under the Constitution[43]; if it was not necessary to preserve public order and peace, it went outside the ambit of s.358(1), outside the ambit of the Criminal Code, and was therefore not done under the authority of the said Code and consequently was not covered by s.48(7). To add to the difficulty of this convoluted argument the first court said:

> Kif gie rilevat sewwa fin-nota ta' l-osservazzjonijiet tar-rikorrent il-kwistjoni (li intant, pero', xorta wahda tibqa spinuza) tirrisolvi ruhha filli jigi determinat safejn il-liberta' ta' l-espressjoni ta' l-individwu tista' tigi cirkoskritta mill-esigenzi tal-ordni pubbliku -- f'liema limiti biss l-ordnijiet imsemmija fil-precitati artikoli 352(cc) u 361 tal-Kodici Kriminali jistghu jitqiesu **legittimi** 44.

Let me attempt to paraphrase. S.352(cc) of the Criminal Code provides that whoever disobeys the lawful orders of any authority or of any person entrusted with a public service is guilty of a contravention. S.361 provides that every police officer may proceed to the arrest of any person who knowingly, or after due warning, disobeys his lawful orders. Now the first court, in the paragraph just quoted, seems to be saying that an order is lawful, at least when that order as a matter of fact amounts to an interference with the freedom of expression, **only** if it is reasonably required in the interests of public order. It is submitted that whereas this is correct as regards the arrest under s.361 -- any other interpretation would mean that virtually no arrest by the police can ever be illegal because the police would simply preface the arrest with any **prima facie** lawful order which they know will not be obeyed -- the same cannot be said with regards to s.352(cc).

LAWFUL POLICE ORDERS

In protecting the provisions of the Criminal Code from unconstitutionality, s.48(7) also protects the interpretation given to those provisions prior to the coming into force of the Constitution. After all, the interpretation of a provision of law is nothing more than an explanation or exposition of the true purport of that provision (usually by reference to the presumed intention of the legislator) and must be held to be an integral part of that provision of law. Our courts, long before the coming into force of the Constitution, had interpreted the meaning of "lawful police orders" in s.352(cc) of the Criminal Code and the advent of the Constitution did not change that interpretation.

One of the earliest reported "lawful orders" cases dates back to 1908[45]. Thirty-one bandsmen tunefully playing in Casal Qormi were ordered by the police to stop playing their instruments. They refused to stop playing. From the law report it is not clear why the police gave the order or what was the occasion or event at which the bandsmen were playing. The court found them guilty of failing to obey the lawful orders of the police. They appealed since they maintained that the police order was not lawful and that they were therefore not bound to obey it, but the appellate court upheld the conviction; the court held that even if the order was not lawful, provided it was an order within the competence of the police and regular in form, the bandsmen had to obey it and then seek redress elsewhere. The court also held that the competence of the police to give a particular order must be presumed by the person to whom the order is directed. It is worth quoting the relevant part of this judgement:

> Atteso che ammessa pure per ipotesi l'illegittimita' di quello ordine, essendo esso stesso di competenza della Polizia e regolare nella forma, i citati nelle circostanze indicate nei motivi premessi alla sentenza appellata, pur sentendone l'ingiustizia, dovevano ubbidire salvo il ricorso contro l'intrinsica ingiustizia. Cosi' Silvio Longhi della resistenza legittima agli atti dell'Autorita' p.106-137 ove cita il Romagnosi e distingue il diritto di resistenza da quello di rifiutare ubbidienza, Cap.V,112-113; vedasi pure il Viazzi delle contravvenzioni p.90, il quale sotto la rubrica "legalita' dell'ordine" dice, l'ordine "dev'essere dato legalmente". Giova tuttavia notare che qualunque ordine dato dall'autorita' (e la competenza si deve sempre presuppore) per ragione (e non per pretesti) di giustizia e di pubblica sicurezza, e' un ordine dato legalmente. 46

This interpretation of what constitutes a "lawful order" was upheld by the Court of Criminal Appeal in the case **Il-Pulizija v. Carmelo Bonello** decided in 1942[47], and in 1959 by Mr. Justice Harding in **Il-Pulizija v. Eugenio Sciberras**[48]. In this last mentioned case, the court, after quoting with approval the dictum that "quando un ordine della Polizia e' di competenza della stessa e regolare nella forma, deve essere ubbidito, salvo il ricorso contro l'intrinsica (in)giustizia", added:

> Izda, apparti dan il-principju, din il-Qorti ma hix affattu inklinata li tghid li kien hemm xi haga illegittima, jew arbitrarja, fl-ordni moghti mis-surgent Micallef. Il-kumpless tal-provi pjuttost juri li z-zewg drivers kienu qeghdin jinkaponixxu ruhhom, ghad-dannu tad-disbrig normali tat-traffiku, u juri wkoll li dak l-ordni kien l-aktar soluzzjoni prattika ghall-evenjenza ta' dak il-mument; tant li, b'manuvra facli u spedita, it-traffiku gie distrikat. 49

There is one apparently conflicting judgement, **La Polizia v. Nobile Conte Francesco Palermo Navarra Bonici**[50]. This judgement is however reconcileable with **Formosa, Bonello** and **Sciberras** on the basis that in the **Bonici** case the

court went for the intrinsic lawfulness of the order, and did not limit itself to its **prima facie** lawfulness. It held that the order was intrinsically lawful because it was given "dall'autorita' per ragione di giustizia e di pubblica sicurezza". Of course, if apart from reasons of public safety the police are expressly authorised by a particular provision of law to give certain specific type of orders, those orders would likewise be intrinsically, as opposed to merely **prima facie**, lawful[51].

The two requisites, therefore, for a "lawful police order" giving rise to the corresponding duty of obedience to that order are (A) that it should be an order within the competence of the police -- and there is a presumption that every order is within the competence of the police. This presumption may of course be rebutted if the order is manifestly illegal and therefore could not possibly be within the competence of the police -- for instance an order to beat up somebody or to run stark naked in the street. The second requisite (B) is that the order must be "regular in form", that is delivered in a normal and regular manner. An order accompanied by blows or punches or with the use of threatening or obscene words would obviously not be regular in form. So also if the order is given in ambiguous terms or in unintelligible language. Even if the order is intrinsically illegitimate or unlawful, that is, not warranted by law, it would still be **prima facie** lawful for the purpose of s.352(cc) if "within the competence of the police" and "regular in form". Thus, for instance, I decide to go and stand next to a ruinous and dangerous portico; a police constable, fearing for my safety, orders me to move along. I refuse. He may arrest me and the court will no doubt convict me under s.352(cc). But the police have no general duty to look after my individual safety in such circumstances, my **personal** or **individual** safety hardly qualifying as the **public** safety. Nor would injury to myself cause, under normal circumstances, public disorder. S.4 of the Malta Police Ordinance, 1961, provides that the Police Force **shall be used, inter alia,** for the protection of life and property, but that section does not impose a **duty**, much less confer a **power**, with regard to my individual safety. I could therefore repay the thoughtful constable by bringing an action for illegal arrest. Likewise it would seem that there is no positive duty on the police to prevent a person from committing suicide if in the process there is no danger to the life, health or property of the public and no danger of public disorder.

Now, from the evidence tendered in **Calleja v. Balzan** there is nothing to indi-

cate that the Inspector's orders to Monsignor Calleja to remove the posters were not **prima facie** lawful as above described. They were intrinsically unlawful for another reason (which shall be examined shortlv) but **prima facie** they were lawful. The Monsignor could have been charged under s.352(cc). But what if the Inspector had proceeded to arrest the Monsignor? Would the arrest have been illegal? It is submitted that if the Inspector's orders were not necessary to preserve public order and peace in terms of s.358(1) of the Criminal Code or were not dictated by sound reasons of public safety (**pubblica sicurezza**) then the arrest would have been illegal under the Criminal Code and consequently under the Constitution. But in this case there was no arrest -- whether out of indecision, out of respect for the cloth or out of knowledge of the subtle legal issues involved -- but only the removal or the grabbing of the posters.

It is further submitted that the correct analytical approach to the legal issue raised in **Calleja v. Balzan** should have been the following:

> A. Were Inspector Balzan's actions (the order to remove, and the removal of, the posters) amounting to interference with freedom of expression necessary to preserve public order and peace and to prevent the commission of any offence as was incumbent on him in terms of s.358(1) of the Criminal Code?
> B. If in the affirmative, then what he did was done under the authority of the Criminal Code and was not unconstitutional in view of s.48(7) of the Constitution;
> C. If in the negative, then Inspector Balzan was not acting under the authority of the Code; it would then be necessary to examine whether he was acting under the authority of some other law or provision of law reasonably required in the interests of public order and, finally, whether that other provision of law and the Inspector's behaviour in conformity thereto were reasonably justifiable in a democratic society.

Inspector Balzan, however, did not attempt to justify his actions other than under the Criminal Code.

The words "public order" have a popular, apart from a legal, meaning. In lay language they simply mean the absence of disorder, and are therefore almost synonymous with orderly and more or less predictable way of life - essential services functioning, motor traffic flowing along, people going about their day to day affairs without undue rush, and when many people have to make use of the same service, be it a bus or the public convenience, they queue up like good Englishmen, even if under the sweltering Maltese sun - in short the absence of confusion and pandemonium. As a phrase, "public order" is never used in contradistinction to "private order". Unlike "public interest" or "public niusance", the element of publicity in "public order" is subsumed in the term itself. English courts have occasionally attempted to determine the element of publicity in other phrases, but never, it would seem

in the phrase "public order". Thus in **R.v. Sussex Confirming Authority, ex p. Tamplin & Sons' Brewery (Brighton), Ltd.**[52] the court held:

> It is fallacious to say that a condition (attached to a justices' licence) is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it.(53)

Or take the case of public niusance in English law. How many people must be inconvenienced before the **public** can be said to be inconvenienced? Lord Denning:

> ....I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public niusance is a niusance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large. 54

In **R. v. Madden**[55] the Court of Criminal Appeal held that in order to prove the offence of public niusance (by making a bogus telephone call falsely giving information about a bomb) it had to be shown that the public, that is to say, a considerable number of persons, or a section of the public, as distinct from individual persons, **had actually been effected;** and one of the reasons for allowing the appeal and quashing the conviction was precisely because there was no evidence that a considerable number of persons had been affected: it was not possible for a jury, properly directed, to have arrived at the conclusion that a considerable number of persons were affected by the action of the appellant. More recently, in **R. v. Norbury**, the Norwich Crown Court upheld an indictment for public niusance against a person who on more than six hundred occasions made obscene telephone calls to over four hundred women "intending to cause offence and alarm and resulting in such offence and alarm" to them[56].

But when it comes to "public order", English judges and lawyers have steered clear of any definition. The English attitude is simply to enumerate the various nominate offences -- usually characterised by the quantitative element of more than one person and the qualitative element of violence -- which the particular author considers to be crimes against public order[57]. Likewise our Criminal Code enumerates, under the general subtitle of "Contraventions Affecting Public Order" a host of acts or omissions, many of which, however, are not attended with either numbers or violence: for example, cutting grass in a fortification[58], or refusing to receive at the established value money lawfully current[59], or wearing a mask in a public place[60], or leading an idle and vagrant life[61].

On the other hand some of the "Contraventions Against the Person" entail a certain quantum of violence: for instance, the contravention of pushing any person in the street with the object of hurting or insulting him[62].

One of the contraventions against public order consists in disturbing the public good order or the public peace in any manner not otherwise provided for in the Criminal Code -- s.352(bb), already referred to. Here the phrases "public good order" and "public peace" are used interchangeably, and appear to have a peculiar and very specific meaning.

THE BISHOP BESIEGED

One of the oldest reported cases which gives an explanation of the words "public good order (and) public peace" (il buon ordine (e) la tranquillita' pubblica) is **Ispettore Raffaele Calleja v. Paolo Bugeja et.**[63] decided in 1890 by Sir Adrian Dingli. The facts of the case were the following:

> ....una gran folla capitanata da Paolo Bugeja, Paolo Azzopardi, e Luigi Bugeja (appellanti) mosse dal Rabato della Notabile a quella Citta', e si fermo' innanzi al Palazzo Vescovile, mentre il Vescovo si preparava a partire per la Valletta...veduta quella folla, Giovanni Mallia, domestico del Vescovo, tento' di chiudere la porta, ma fu impedito principalmente dal detto Luigi Bugeja e da Gaetano Vella (altro appellante), i quali dicevano di volere entrare per parlare al Vescovo...in un istante, lo spazio tra il portone del palazzo e l'antiporta si empi' di gente che faceva pressa verso l'interno ove era la carrozza in aspettazione del Vescovo...si gridava "Vogliamo sapere perche' il Vescovo ha licenziato i Santesi"; "Vogliamo soddisfazione"; "Non uscirete di qui, non uscirete prima di darci risposta". In quel punto si presento' il Vicario, il quale scendeva le scale accompagnando il Vescovo, e il detto Paolo Bugeja gli disse: "Noi vi abbiamo fatto ricco, noi vi abbiamo fatto rispettabile (nies), il Vescovo e' un....." usando qui schifosissime parole accompagnate con una bestemmia...la folla intanto spingeva innanzi, malgrado gli sforzi dello Ispettore Raffaele Calleja per impedirla; i detti Luigi Bugeja e Gaetano Vella e Paolo Azzopardi (altro appellante) continuavano ad avanzare nonostante il divieto del Vescovo, gridando: "In S. Paolo non entri nessuno, perche' noi commandiano, la chiesa e' nostra" e battendo colle mani sullo sportello della carrozza ove il Vescovo era gia entrato...il Vicario sgrido' la folla, chiedendo nello stesso tempo allo Ispettore di prendere nota dei nomi dei caporioni per citarli... accordato poi il permesso a quattro individui di parlare al Vescovo, e, data indi dal Vicario informazione alla folla, che i Santesi sarebbero rimasti ai loro posti fino a nuovo ordine, i clamore cessarono, a suggerimento del Vicario medesimo, si domando' scusa al Vescovo, e la folla usci' dal Palazzo, gridando e battendo le mani. 64

Neither the Bishop nor the Vicar or the domestic were in any way injured or physically assaulted. Sir Adrian held that there was a disturbance of public good order and the public peace, because every act which induces apprehension for the safety of the public in general or of individuals in particular is an act done in breach of public order and the public peace "indipendentemente della

perpetrazione di altro reato". Safety must here be understood as absence of injury from violent behaviour. It does not take much to see the similarity between this exposition of our law and the notion of "breach of the peace" in English law.

The term "breach of the peace" is one of the most elusive terms in English criminal law. A breach of the peace is not (in England) a substantive offence but confers certain common law powers of arrest. Professor Glanville Williams considers that the general meaning of the concept of "breach of the peace" is **an act involving danger to the person**[65]. In so far as it means "a breach of the Queen's peace" it should, strictly speaking, include every crime. The concept of breach of the peace in England has a related yet somewhat distinct branch dealing with instances of **public violence**, that is, acts **in terrorem populi,** such as the common law offences of affray, unlawful assembly and riot: offences which in our Criminal Code are found in the title dealing with crimes against the public peace. Indeed, the crimes dealt with in sections 63 to 82A of our Criminal Code constitute, for the most part, also a disturbance of public good order and the public peace, s.352(bb) apparently being left to deal with such disturbances of a less serious nature which do not fall specifically under any of these or any other sections. Going armed in public is not **of itself** a breach of the peace in English law, although the circumstances may be such as to create a reasonable apprehension of danger on the part of others and therefore constitute a breach of the peace or even possibly an unlawful assembly. A degree of disturbance which might result from disorderly conduct, abusive language, excessive noise and so on will not necessarily constitute a breach of the peace unless there is reasonable cause for apprehending a threat or use of force. Conduct which is annoying but which involves neither menace, violence, the threat of violence or any element of incitement to violence does not constitute a breach of the peace. So also disorder which is superficial or self-contained and which contains no real danger to others does not amount to a breach of the peace. An English case, **Wooding v. Oxley**[66], decided in 1839, would seem to hold that heckling at a public meeting is not, per se, conduct which would justify an arrest for breach of the peace -- possibly because heckling is a time-honoured practice at public meetings in England. In the case **Amabile Schembri v. Giuseppe Bartolo**[67] heckling at public meetings was also held to be a legitimate practice in Malta, provided that the signs and sounds of approval or disapproval of what the speaker is saying do not degenerate into personal violence "o minaccia all'ordine pubblico". And in this parti-

cular case Mr. Justice (later Sir) Arturo Mercieca went on to say that the hiring of a large number of persons from lower and violent classes for the purpose of disturbing the speakers, not by counter argument, questions or mere heckling, but by shouting, squawking (schiamazzi) and threatening violence such as to induce fear in the speaker and his audience, amounted to a disturbance of public order.

Shouting loudly in the street or blowing a horn do not amount to a breach of the peace at English common law. This point was taken up in **Il-Pulizija v. Paul Montebello**[68] where the court drew a sharp distinction between the contravention contemplated in s.352(m) (disturbing at night time the repose of the inhabitants by rowdiness, bawling or in any other manner) and that contemplated in s.352(bb).

Repeated pestering of a young woman does not constitute a breach of the peace in English law unless the woman goes about in fear of personal violence by reason of the threats made by the person complained of: there must be, in other words, an element of threat or menace, whether by words, gestures or conduct[69]. It must be noted that in Scotland, where breach of the peace is a substantive offence, the notion is wider than in England because it also includes, apart from threats against personal safety, also breaches of public decorum. Thus in the Scots case **Raffaeli v. Heatly**[70] the activity of a "peeping Tom" was held to amount to a breach of the peace in the absence of any threats of violence or menace; and more recently, in 1977, a case was reported in **The Guardian**[71] where a youth was found guilty by a Sheriff's Court in Glasgow of breach of the peace for persistently following and staring at girl students over a period of fourteen months.

The latest, and perhaps most authoritative, definition of what amounts to a breach of the peace in English law was laid down in **R. v. Howell**[72]:

> We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance. 73

The equation of "disturbance of public good order or the public peace" in s.352 (bb) with "breach of the peace" as understood in English law seems to-day to be settled law: the point was made quite clear in 1954 in the case **Il-Pulizija v. Carmela Scinto et.**[74]. It is further supported by a number of cases[75], decided in 1958 and 1959, which dealt with s.6(1)(b) of the Preservation of Public Order

Emergency Ordinance, 1958[76]. The relevant part of this section read:

> Any person who....conducts himself in a manner likely to cause a breach of the peace, shall be guilty of an offence.

The words "breach of the peace" in this section were given the same interpretation as "disturbing the public good order or the public peace" by our courts. But the Emergency Ordinance had the additional words "likely to cause". In other words it was sufficient, as was held in **Il-Pulizija v. William Allen**[77] that there was a "probability" (which the court equated with "reasonable anticipation") of a breach of the peace: even if the breach of the peace had not actually occurred, there was nonetheless a substantive offence under this section of the Emergency Ordinance if the individual's behaviour was likely, in the circumstances, to lead to a breach of the peace. A thing is likely to happen when there are reasonable probabilities that it will happen[78]. But "likely" can also mean "such as might well happen". In a New Zealand case it was held that "the meaning to be given to the word 'likely' where it is used in a statute or regulation will depend upon the statute or regulation and the context in which the word is used"[79]. On the other hand s.352(bb) requires an actual breach of the peace, although for an actual breach of the peace it is sufficient that there be reasonable apprehension of danger to the safety of one or more individuals or of his or their property, the danger arising, as has already been said, from violence or threats of violence.

THE TEST OF REASONABLENESS

The words "public peace" as used in ss.395(1) and 396 of the Criminal Code have been given a slightly wider interpretation than "public good order or the public peace" in s.352(bb). In **La Polizia v. Emmanuela Vella**[80] it was held that

> .....le due disposizioni (395(1) and 396) hanno per fine principale quello di impedire la vicina ripetizione di reati che attaccano la sicurezza individuale ed il buon ordine pubblico, avuto riguardo alle particolari circostanze del caso ed alla condotta dell' imputato. 81

But Vella had been bound over to keep the peace not because of any violent behaviour or disposition on her part but because she had been found guilty of holding lotteries without police permission. The appellate court held:

> Attesocche' le lotterie al primo estratto senza permesso della Polizia e quindi senza controllo sono divenute molto estese e frequenti e spesso sono occasioni di frodi e causa di litigi domestici e di rovina di famiglie povere, onde, anche se la condotta

della imputata non fosse essa stessa un motivo che avesse determinato la prima corte a dare il detto provvedimento in aggiunta all'ammenda, lo stesso sarebbe stato giustificato. 82

Our courts have also had occasion to interpret the phrase "offence affecting public order" in s.537(d) and in the provisos to ss.538 and 385 of the Criminal Code. Unfortunately all the reported cases are instances of defilement of minors, rape or violent indecent assault committed in a public place or in a place accessible to the public, and it is precisely this place of commission of the principal offence which has been held to be the criterion determining the additional offence ("accompanying" offence) affecting public order[83].

To sum up, therefore, it would seem that broadly speaking the term "public order and peace" as used in the Criminal Code[84] means the absence of danger to the safety of individuals or to the safety of property as well as the absence of reasonable apprehension of such danger, the danger arising from violence, or from threats of violence, or from some other disturbance or state of facts. Now s.358(1) imposes upon the police the duty to preserve public order and peace (in effect to prevent a breach of the peace before it is committed) as well as to prevent the commission of all other offences, whether crimes or contraventions. But such preventive action must, in the light of all the circumstances, including the behaviour complained of, be reasonable by the standards of the Criminal Code. And what is reasonable is what is **objectively** reasonable, not what the police officer on the spot, subjectively, and on the spur of the moment may think is reasonable. This concept is fundamental to a proper understanding of police powers, particularly the power of arrest; it is also a fundamental concept in any free society. Thus, s.359 authorises the police to arrest a person who is suspected of having committed a crime punishable with imprisonment. Properly understood that section should read "who is **reasonably** suspected of having committed a crime punishable with imprisonment" (with the exception of crimes punishable under the Press Act, 1974). And what is reasonable is not necessarily what the policeman on the spot may think is reasonable; his conclusion may be the result of excitement, fear, inexperience or an exceptionally fertile imagination. The policeman's judgement is always subject to review by the court[85] which must apply objective standards:

> What is wanted is that the circumstances of the case be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence. It is important that hasty or ill advised police action should be avoided. If, on the other hand, the police hesitate too long to arrest a person

> when they have a proper and sufficient ground of suspicion against him, they may loose the opportunity of arresting him or enable him to destroy evidence. 86

And this was the fundamental mistake in the first court's judgement in **Calleja v. Balzan**, that is in giving preference to the subjective assessment of the situation made by Inspector Balzan over the objective assessment resulting from the evidence. The Constitutional Court, on the other hand, went for objective reasonableness.

Now, did the Monsignor's actions in displaying the posters amount to a breach of the peace? Certainly not: his actions were neither violent or menacing, nor could they, per se, inspire fear for one's personal safety or the safety of property[87].

Was Inspector Balzan's interference (the orders to remove the posters, and the removal of the poster from the Monsignor's hands) reasonable by the standards of the Criminal Code? In other words, were his actions reasonably necessary to prevent a breach of the peace or the commission of some other offence? The answer again is in the negative. If a breach of the peace was reasonably expected, the **remote** cause was the Monsignor's behaviour but the **immediate** cause was the threatening behaviour of those people who wanted to stop the Monsignor from expressing his view. To hold otherwise would be tantamount to saying that any peaceful and essentially lawful activity may be suppressed because somebody else decides to behave violently or unlawfully in respect of that activity thereby creating a breach of the peace. Clearly this would amount to a gross subversion of the basic principle of freedom upon which the Criminal Code itself is founded. A peaceful and lawful activity does not become unlawful or merit suppression because of the violent and unlawful activity of others; if at all, it is those others which must be restrained, and the activity of those others which must be suppressed. Needless to say, it is conceivable, in extremis, that the police, **having done their utmost to prevent those others from disrupting a lawful activity**, find that the situation has gone out of hand and that the only way of preventing the commission of more serious offences, is to suppress also the lawful activity. But Inspector Balzan was in no way faced with a hopeless or out of hand situation. It does not seem that he had used all the authority at his disposal -- such as summoning more policemen to be stationed near the Monsignor -- to prevent a breach of the peace or the commission of more serious offences by those who, it was clear, did not share the Monsignor's views. Instead he took the short cut, and attemp-

ted to stop the Monsignor. This was unreasonable by the standards of the Criminal Code, was therefore not done under the authority of that law and consequently was unconstitutional.

The unenviable situation in which Inspector Balzan found himself was, of course, not novel. Way back in 1882 the Salvation Army, which preached temperance, met at Weston-super-Mare, England, with the knowledge that they would be opposed by the Skeleton Army, an organisation financed partly by brewery owners and who had made it a habit of disrupting the meetings of the Salvation Army. The magistrates put out a notice forbidding the Salvation Army's meeting. The Salvationists, however, assembled, were met by the police and told to obey the notice. One of the members declined to obey and was arrested. He was subsequently, with others, convicted by the magistrates of taking part in an unlawful assembly. It was an undoubted fact that the meeting of the Salvation Army was likely to lead to an attack by the Skeleton Army and in this sense cause a breach of the peace. The conviction by the magistrates was quashed on appeal to the Queen's Bench Division:

> What has happened here is that an unlawful organisation (the Skeleton Army) has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition. 88

The principle expressed in this case was taken up in an Irish case, **R. v. Justices of Londonderry**[89]:

> Much has been said on both sides in the course of the argument about the case of **Beatty v. Gilbanks.** I am not sure that I would have taken the same view of the facts of that case as was adopted by the Court that decided it; but I agree with both the law as laid down by the Judges, and their application of it to the facts as they understood them. The principle underlying the decision seems to me to be that an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying of a business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way. 90

And another judge, in the same case, observed:

> If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights. 91

NOTES

1. Denning A.T., **The Due Process of Law**, Butterworths (London), 1980, p.102.

2. **Re: Galea and Borg** (1981) 7 C.L.B. 932; **Re: Dingli, Attard and Vassallo** (1983) 9 C.L.B. 110.

3. **Decizjonijiet Kostituzzjonali 1964-1978**, Ghaqda Studenti tal-Ligi (Malta), 1979, Vol.II, p.465.

4. Borg A.J., **The Reform of the Council of Trent in Malta and Gozo,** (Malta), 1975, pp.11, 50-51; as for laws regulating the civil effects of marriage, **ibid.** p.53. See also, Bonnici A., **History of the Church in Malta**, Vol.II, (Malta), 1968, pp.54-55 and 140-141.

5. As for the French period see generally Denaro V.F., **The French in Malta**, (Malta), 1963?, pp.46-54.

6. Proclamation VII of 1831. See, Harding H.W., **Maltese Legal History under British Rule 1801-1836**, (Malta), 1968, pp.238 **et seq.**

7. Bonnici A., **History of the Church in Malta**, Vol.III, (Malta), 1975, pp.246-255; Frendo H., **Party Politics in a Fortress Colony**, Midsea Books (Malta), 1979, pp.70-89; Vassallo E.P., **Strickland**, Progress Press (Malta), 1932, pp.23-26; Laferla A.V., **British Malta**, Vol.I, A.C. Aquilina & Co. (Malta), 1946, pp.189-190 and 270-271, and by the same author, **British Malta**, Vol.II, A.C. Aquilina & Co. (Malta), 1947, p.105-108 and 125-129.

8. Ganado H., **Rajt Malta Tinbidel**, Vol.IV, (Malta), 1977, pp.342-343 and 390-391; **Mintoff: Dak li ta Hinu u Hiltu ghal Malta**, Ghaqda Zghazagh Socjalisti (Malta), 1972?, pp.56-66; Mintoff D. (ed.), **Malta: Church, State, Labour - Documents recording negotiations between the Vatican Authorities and the Labour Party 1964-1965**, Malta Labour Party (Malta), 1966, pp.45, 57, 61-62, 65.

9. **Deciz. Kost., op. cit.**, pp.469, 475 and 480.

10. Offences against discipline: para. 8(c): "Unlawful or unnecessary exercise of authority, that is to say, if a member of the Force without good and sufficient cause....is uncivil to any member of the public".

11. **Deciz. Kost., op. cit.**, p.467.

12. See also, **Borg Olivier et. v. Buttigieg, Deciz. Kost.**, Vol.I, p.138 / p.156.

13. S.33 of the Constitution; compare with s.46(1), (4)(b) and (6). See also article 4 of the U.N. Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they live, (1981) 7 C.L.B. 321 at 326.

14. ss.1(2) and 126(1) of the Constitution; see also the Territorial Waters and Contiguous Zone Act, 1971.

15. See also, European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories - Strasbourg, 22 January, 1965.

The Parliamentary Assembly of the Council of Europe has for some time now been considering the legal questions raised by direct satellite broadcasts.

16. Abraham H.J., **Freedom and the Court**, O.U.P. 1982, p.153.

17. Tornaritis C.G., **The Right of Silence**, in (1981) 7 C.L.B. 1616.

18. **Deciz. Kost.**, Vol.I, **op. cit.**, at pp.154-158.

19. See also s.5 of the 1961 Constitution.

20. S.47(1) of the Constitution.

21. In **Ramji Lal v. State of Uttar Pradesh** [1957] A.I.R. SC 620, the Indian Supreme Court held the phrase "in the interests of" to be wider than "for the maintenance of" so as to cover restrictions on statements or utterances tending to cause public disorder, though they may not actually lead to a breach. The point was quickly taken up by the first court in **Calleja v. Balzan, Deciz. Kost.**, Vol.II, **op. cit.**, at p.473-474. The difference between the two phrases, however, is not all that clear.

22. See, for instance, **Il-Pulizija v. Ganni Camilleri et., Deciz. Kost.**, Vol.I, p.1 at pp.48-51. Also, European Commission of Human Rights Application 7805/77, **Pastor X and the Church of Scientology v. Sweden**, declared inadmissible on the 5/5/1979 in 22 **Yearbook** pp.244 **et.seq.**, esp. p.252; **Handyside Case**, decided by the European Court of Human Rights on the 7/12/1976 in 19 **Yearbook** p.506 **et. seq.**, esp. pp.508 and 510; and the Report of the Commission on the same case in **European Court of Human Rights** (Series B), Vol.22, Handyside Case, (Strasbourg), 1979, esp. pp.44-45.

23. This subsection was introduced by Act LVIII of 1974. Under s.10 (now repealed) of the Public Meetings Ordinance (Cap.108) public open air meetings could not be held in Valletta or Floriana. As orginally enacted in 1931, s.10 read as follows: "No public open air meeting may be held within the limits of Valletta or Floriana and no such meeting may be continued after sunset". By Act XXX of 1955, the prohibition was limited to the Treasury Square, Palace Square, Kingsway and Merchants Street in Valletta. Then by Ordinance XX of 1959, the entire section was substituted to read as follows: "No public open air meeting shall be held within the limits of Valletta or Floriana". S.10 was eventually repealed by Act XXII of 1971, s.3.

24. S.19(2): "The Governor may, by Proclamation, for reasons of public order, prohibit the holding of all public meetings for a specified period not exceeding three months. Such prohibition may be renewed for further periods each of which, however, shall not exceed three months". S.21 provides: "The Governor may, by Proclamation, prohibit the holding of all demonstrations in any place open to the public on any particular occasion or for a specified period not exceeding three months. Such prohibition may be renewed for further periods each of which, however, shall not exceed three months". What if the Presidential Proclamation under s.21 were to prohibit all demonstrations in any, i.e., in every place open to the public in Luqa on a particular occasion, for example, on the occasion of the feast of the patron saint of the village? Would such a prohibition fall foul of s.43(3) of the Constitution? However, it is submitted, if the prohibition were limited to one or more specific places open to the public at Luqa, e.g.

the two streets where the rival band clubs are situated, the Proclamation would definitely not be unconstitutional. See also s.65(1) of the Electoral (Polling) Ordinance (Cap.163).

25. **Il-Pulizija v. Ganni Camilleri et., Deciz. Kost.,** Vol.I, p.1.

26. S.2 of Cap.108. It is submitted that the words "open space" in this section must be interpreted **ejusdem generis** with "public street" and "square" and therefore to mean "public open space" or "open space accessible to the public".

27. But such a demonstration would be subject to such police orders as may be given in terms of s.31(1)(f) of the Code of Police Laws (Cap.13). Nor, it would seem, is previous notice or permission required for the holding of a procession, other than a procession to or from a public meeting (s.9, Public Meetings Ordinance). However a police permit is required for the holding of a band march, Police Licences Regulations, 1949 (G.N. 846/49), First Schedule, item 29. See also, **Il-Pulizija v. George Agius,** Ct. of Mag. of Ju. Pol., 3/8/1982.

28. Public Meetings Ordinance: s.20: "It shall be lawful for the Commissioner of Police for reasons of public order to disperse any demonstration".

29. **Deciz. Kost.,** Vol.I, p.138. The circular is quoted at pp.151, 152.

30. **ibid.,** p.1.

31. ss.14 and 15 of the 1961 Constitution.

32. **Deciz. Kost.,** Vol.I, p.15. See also s.743(6) of the Code of Organisation and Civil Procedure (Cap.15).
(Translation of quotation) "....even if the Proclamation was not law, but a simple act of the executive branch, it always remains an act which, besides the question of its validity, is made 'under and according to the authority of the law', and the Court is obliged to resist the suggestion that for the citizens to be able to impute an act purporting to be done under the authority of a law they have, by force to impute the law. This is not only contrary to the clear words of the dispositions under examination but may be the result of superfluous attempts to impute perfectly good laws every time that a government official steps on somebody's toes and is brought to court under the 'human rights' dispositions."

33. **Deciz. Kost.,** Vol.I, p.25.

34. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et.,** Constitutional Court, 20/1/82. On the same day another case was decided by the Constitutional Court on exactly the same grounds, **Dr. Louis Galea noe. et. v. Salvu Sant noe.**
(Translation of quotation) "....for an administrative act, made in conformity with a provision of the law, and therefore authorised by that law, to be declared null and without effect, considered in itself, because it is in breach of Art.42 of the Constitution, it must also necessarily be declared that the provision which authorizes that act is also in breach of Article 42, because the illegality of the administrative act is the unconstitutionality of the legislative provision, which is the cause; in such a case, therefore, every action directed to impute the administrative act cannot in this context be considered in isolation and independently of the legislative provi-

sion, under which that same act would have been made, because the illegality of the act is necessarily the consequence of the illegality of the law, in such a manner that before the one is established, the other must have already been established."

35. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et., supra.**
(Translation of quotation) "....However, for an administrative act allegedly made under the authority of a particular law to be declared null and without effect, without imputing at the same time the law itself (always independently of imputing it on the basis of discrimination) obviously requires that the action in itself is vitiated, in such a manner that it becomes illegal and one cannot any longer say that the action was validly made in conformity to the law."

36. **Reflections on 20 years of human rights in Malta,** in **De Jure,** Crest Publishing (Malta), no.1, 1982, p.3 at p.12.

37. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et., supra.**
(Translation of quotation) "The law in question is not one of those protected in the First Schedule of the Constitution, but all the same it was never brought up, and it is therefore necessary for the Court to decide only the question brought before it on the basis of the plea before it, and therefore cannot declare null and without effect something the validity and the legality of which is not at issue, or else declare null any particular act on the basis of nullity of something else when such basis would not have been deduced."

38. Civil Court, First Hall, 28/6/1983.

39. **ibid.**
(Translation of quotation) "In the oral proceedings, counsel to the Police submitted that the mentioned refusal took place 'under the authority of the law' which was not attacked by the plaintiffs and as a consequence plaintiffs cannot attack the refusal if they had not before attacked the law. This submission is not legally correct; in the Court's opinion, every act, except of course the question of its validity or otherwise, can be attacked by the individual who invokes in his favour the disposition of Article 42 of the Constitution, it not being necessary for the individual to impute also the law under which and according to which the act is alleged to have been made...otherwise the act of an official however abusive it may be, may never be imputed by way of a disposition which guarantees the fundamental right in cases where it is alleged that that act was made under the authority of some law, which law as a rule, one usually assumes to be perfectly good."

40. **Deciz. Kost.,** Vol.II, at p.472.

41. **ibid.**

42. **Deciz. Kost.,** Vol.I, p.216.

43. That is, apart from the fact of that behaviour being safeguarded by s.48(7). It should be clear however that the phrases "necessary to preserve public order" and "reasonably required in the interests of public order" may not be absolutely identical in their import. See also n.21, **supra.**

44. **Deciz. Kost.,** Vol.II, p.472.

(Translation of quotation) "As was rightly noted by the applicant in his note of observations the question (which remains a thorny one) resolves itself in the determination of up to what extent the freedom of expression of the individual may be circumscribed by the exigencies of public order - up to what limits may the orders mentioned in the above-quoted articles 352(cc) and 361 of the Criminal Code, be regarded as legitimate."

45. **La Polizia (Ispettore Paolo Mamo) v. Paolo Formosa et., Deciz.** Vol.XX.IV.28.

46. **ibid.**, at 29.
(Translation of quotation) "If one were to admit as a hypothesis that the order was illegitimate, yet coming within the competence of the Police to issue, and regular in form, defendants must in the circumstances indicated in the motives for the appealed sentence, although aware of the injustice must obey, reserving their right to take steps against the intrinsic injustice. Thus Silvio Longhi in his 'Legitimate resistance to the acts of the Authority' pp.106-137 quotes Romagnosi and distinguishes the right to resistance from that of refusing obedience, chapter V pp.112-113, vide also Viazzi on contraventions p.90, who under the heading 'Legality of the order' says that the order 'must be given legally'. One must above all notice that any order given by the authority (and the competence must always be presupposed) for reasons (and not pretexts) of justice and public security, is an order legally given."

47. **Deciz.** Vol.XXXI.IV.472.

48. **Deciz.** Vol.XLIII.IV.1075.

49. **ibid.** at 1076.
(Translation of quotation) "However, besides this principle, this Court is not at all inclined to say that there is something illegitimate, or arbitrary, in the order given by Sergeant Micallef. The evidence overall rather shows that the two drivers were interrupting the regular flow of traffic through their actions and also shows that the order was the most practical solution under the circumstances; so much so, that with an easy and expedite manoeuvre, the normal flow of traffic was resumed."

50. **Deciz.** Vol.XXVII.IV.662, quoted with approval in **Il-Pulizija v. Enrico Guidi et.**, Ct. of Crim. App., 23/11/1982. See also, **Il-Pulizija v. Ganni Gauci, Deciz.** Vol.XXXIII.IV.866.

51. See **Il-Pulizija v. Domenic Mintoff**, H.M. Ct. of Crim. App., 9/4/1960, reported in Gulia O., **Appelli Kriminali**, A.C. Aquilina & Co. (Malta), 1966, p.28; **Il-Pulizija v. Carmelo Cassar, Deciz.** Vol.XXXVIII.IV.809; **Il-Pulizija v. Pietru Azzopardi, Deciz.** Vol.XXXIX.IV.1029.

52. [1937] 4 All E.R. 106.

53. **ibid.** at 112.

54. **A.-G. v. P.Y.A. Quarries Ltd.** [1957] 1 All E.R. 894 at 908.

55. [1975] 3 All E.R. 155.

56. [1978] Crim.L.R. 435.

57. See for example, The Law Commission, **Offences Against Public Order**, Working paper no.82, H.M.S.O., 1982.

58. S.352(a).

59. S.352(k).

60. S.352(n).

61. S.352(w).

62. S.353(1)(L).

63. **Deciz.** Vol.XII.472.

64. **ibid.** at p.473, 474.
(Translation of quotation) "A large crowd led by Paolo Bugeja, Paolo Azzopardi, and Luigi Bugeja (appellants) moved from Rabat to Mdina and stopped in front of the Bishop's Palace, as the Bishop was preparing to leave for Valletta...on seeing such a crowd, Giovanni Mallia, one of the Bishop's servants, tried to close the door, but was prevented from doing so mainly by Luigi Bugeja and Gaetano Vella (another appellant) who said they wanted to enter to talk to the Bishop...suddenly, the space between the main door of the Palace and the portal became full of people who were pressing towards the interior where a carriage was waiting for the Bishop...they shouted 'We want to know why the Bishop has dismissed the Santesi', 'We want satisfaction', 'You shall not get out of here, you shall not get out of here before giving us an answer'. At that moment the Vicar appeared descending the stairs accompanying the Bishop, and the afore-mentioned Paolo Bugeja told him 'We have made you rich, we have made you respectable (nies), the Bishop is a .....' using here disgusting words accompanied by a swear-word...the crowd in the meantime pushed forward, despite the efforts of Inspector Raffaele Calleja to prevent it, the said Luigi Bugeja and Gaetano Vella and Paolo Azzopardi (another appellant) continued to advance despite the prohibition of the Bishop, shouting: 'In St. Paul's nobody enters because we command, the Church is ours' and beating their hands on the door of the carriage where the Bishop had already entered... the Vicar shouted at the crowd, at the same time asking the Inspector to take a note of the names of the ring-leaders in order to arraign them ...then gave permission to four individuals to talk to the Bishop, and the Vicar having informed the crowd that the Santesi would remain in their posts until further orders, the rumpus ceased, at the Vicar's own suggestion pardon was asked from the Bishop, and the crowd went out of the Palace shouting and clapping their hands."

65. Glanville Williams [1954] Crim.L.R. 578.

66. (1839) 9 C. & P. 1

67. **Deciz.** Vol.XXV.II.66.

68. **Deciz.** Vol.XLI.IV.1361.

69. **R. v. Dunn** (1840) 12 Ad. & El. 599.

70. (1949) S.L.T. 284.

71. Dec. 8, 1977.

72. [1981] 3 All E.R. 383.

73. **ibid.** at 398.

74. **Deciz.** Vol.XXXVIII.IV.802.

75. e.g. **Il-Pulizija v. Edgar Grixti, Deciz.** Vol.XLIII.IV.1004; and see also **Il-Pulizija v. Mary Simiana, Deciz.** Vol.XXXVIII.IV.818; **Il-Pulizija v. Lewis Taliana, Deciz.** Vol.XL.IV.1237; **Il-Pulizija v. Anglu Scicluna, Deciz.** Vol.XLI. iV.1470.

76. Repealed by Act VIII of 1963.

77. **Deciz.** Vol.XLIII.IV.1017.

78. **Dowling v. South Canterbury Electric Power Board** [1966] N.Z.L.R. 676 at 678.

79. **Transport Ministry v. Simmonds** [1973] 1 N.Z.L.R. 359 at 362.

80. **Deciz.** Vol.XXV.IV.889.

81. **ibid.** at p.890.
(Translation of quotation) "...the two dispositions (395(1) and 396) have as their main aim the prevention of close repetition of crimes which attack individual security and public good order, having regard to all the particular circumstances of the case and to the conduct of the accused."

82. **ibid.**
(Translation of quotation) "Seeing that the lotteries, without police permission and therefore without control, had become very widespread and frequent and are often the cause of frauds, domestic quarrels and the ruin of poor families, even if the conduct of the accused was not itself the reason that determined the First Court to give the said precaution in addition to the small fine, the same would have been justified."

83. See for example, **R. v. Gio Maria Fenech et., Deciz.** Vol.XXII.IV.15; **R. v. Giuseppe Busuttil, Deciz.** Vol.XXIV.IV.884; **Il-Pulizija v. Joseph Scicluna, Deciz.** Vol.XL.IV.1119. Also, Cremona G., **Raccolta della Giurisprudenza sul Codice Penale**, (Malta), 1935, pp.585-589. As for the word "accompanied" in the provisos to ss.538 and 385, see **Il-Pulizija v. Karmenu Cassar, Deciz.** Vol.XXXII.IV.895.

84. The words "public order" as used in the Constitution may have a wider meaning. In this connection see the judgement of the Civil Court, First Hall, delivered on the 22/10/1981 in **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et.** See also, the majority judgement in **Romesh Thappar v. The State of Madras** (1950) S.C.R. 594; and generally, Basu D.D., **Commentary on the Constitution of India,** Vol.I, Sarkar & Sons (Calcutta), 1961, pp.544-548 and 623-624.

85. Leigh L.H., **Police Powers in England and Wales,** Butterworths (London), 1975, pp.62-63.

86. **ibid.** p.64.

87. The posters certainly did not contain anything defamatory, as was the case in **Il-Pulizija v. Norman Lowell**, Ct. of Mag. of Ju. Pol., 26/5/1980; Ct. of Crim. App., 4/9/1980.

88. **Beatty v. Gillbanks** (1882) 9 Q.B.D. 308 at 314.

89. (1891) 28 L.R. Ir. 440.

90. **ibid.** at 461, 462.

91. **ibid.** at 450.